No. 83-5424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GLEN BURTON AKE, PETITIONER

v.

THE STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE; AND

BRIEF OF THE PUBLIC DEFENDER OF OKLAHOMA COUNTY, OKLAHOMA, THE PUBLIC DEFENDER OF TULSA COUNTY, OKLAHOMA, AND THE OKLAHOMA CRIMINAL DEFENSE LAWER'S ASSOCIATION, AS AMICI CURIAE SUPPORTING PETITIONER.

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To the Honorable, The Chief Justice and Associate Justices of the United States Supreme Court:

The Office of the Public Defender of Oklahoma County, Oklahoma, the Office of the Public Defender of Tulsa County, Oklahoma, and the Oklahoma Criminal Defense Lawyer's Association (OCDLA) respectfully moves for leave to file the attached brief amici curiae.

The consent of the attorney for the petitioner has been obtained and filed with the Clerk. Respondent has declined to consent, based on its Office policy of remaining silent with regard to amici curiae briefs.

The Office of the Public Defender of Oklahoma and of Tulsa Counties are statutorily created offices created for the primary purpose of representing indigent persons accused of crimes, including capital offenses. 19 Okl. Stat. §§138.1 et. seq. On several occasions, these Offices have attempted, without success, to obtain funds for investigating and presenting expert witnesses, and to secure mitigating evidence in capital cases. See, Davis v. State, 665 P.2d 1186 (Okl.Cr. 1983); Cox v. State, 644 P.2d 1077 (Okl.Cr. 1982); Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980). This Office is vitally interested in the resolution of this case affirming a constitutional right to these funds.

The OCDLA is a statewide, non-profit organization of over 200 criminal defense attorneys dedicated to goals of professional excellence, protection of the rights of individuals, and the promotion of justice through law. Various members of the Association are appointed by the courts to represent indigent defendants outside the Tulsa and Oklahoma Counties. Like

these public defenders, they receive no funding for expert witnesses, or mitigation evidence in capital cases. See Maghe v. State, 620 P.2d 433 (Okl.Cr. 1980). The membership of this Association shares the interest of the Public Defenders of Tulsa and Oklahoma Counties in affirming a constitutional right to these funds.

Amici Curiae concurs with all of the arguments advanced in the Petition for Writ of Certiorari, and Brief of Petitioner filed in this case. However, Amici notes that each of the attorneys for Amici are Oklahoma lawyers practicing criminal law on an exclusive basis. Because counsel for Mr. Ake is not an Oklahoma lawyer, and is not intimately familiar with Oklahoma procedure, petitioner has not addressed how the nuances of Oklahoma law and procedure effect this issue. Because the primary purpose of the attached brief amici curiae is to demonstrate to the Court the relationship of current Oklahoma law and procedure to this issue, this brief can make a contribution to the Court's decisional process in this case.

Accordingly, the Offices of the Public Defender of Oklahoma and Tulsa Counties, Oklahoma and the OCDLA move for leave to file the attached brief amici curiae.

Respectfully submitted,

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QUESTIONS PRESENTED

Amici will address the following issues:

1. When an indigent defendant's legal sanity at the time of the offense is seriously in issue, can a state constitutionally refuse to provide any opportunity whatsoever for him to obtain expert psychiatric examination necessary to prepare and establish his insanity defense?

2. Is an indigent defendant facing the death penalty entitled to financial assistance to prepare and present evidence in his favor at the sentencing hearing?

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INTEREST OF AMICI

The Offices of the Public Defender of Oklahoma County and of Tulsa County are statutorily created offices whose primary function is the representation of indigent criminal defendants in these two metropolitan areas. These offices represent thousands of indigent defendants each year, some of whom are charged with, and tried for, capital murder. In some of these cases, insanity is raised as a defense. Neither office receives funds for expert witnesses necessary for the preparation and defense of these cases. (Infra, p. 6-10).

The Oklahoma Criminal Defense Lawyer's Association (OCDLA) is a state wide, non-profit organization of over 200 practicing attorneys founded in 1976, dedicated to goals of professional excellence, protection of the rights of individuals, and promotion of justice through

law. Many members of the OCDLA are appointed to represent indigent accused persons for various criminal offenses, including capital murder. In some of these cases, the insanity defense is raised. These attorneys receive a token fee and no expense money for investigation of the case. (Infra at 6-11).

Amici are vitally interested in the principles laid down in this case regarding the right to funds to investigate and present an insanity defense, and to explore and investigate mitigating evidence in capital cases. Our vital interest in affirming the constitutional right to access to necessary funds in these areas led to our involvement in this case.

SUMMARY OF ARGUMENT

I. Oklahoma provides a small fee for attorneys appointed to represent indigent criminal defendants. It provides no funds

for these attorneys or public defenders in order that a serious insanity defense can be developed and presented. (point I.A., infra.) The manner in which Oklahoma has chosen to apply the insanity defense makes it extremely difficult, if not impossible, to prevail without the assistance of an expert witness. (point I.B., infra.) Denial of funds to obtain and present such an expert is violative of numerous constitutional guarantees. (point I.C. infra.)

II. Oklahoma trial judges have recognized the need to provide funding to indigent capital defendants in order to explore and present mitigating evidence. The Oklahoma Court of Criminal Appeals, though recognizing the usefulness of this evidence, has consistently denied these funds. This is a violation of the Eighth Amendment, as applied to the states through the Fourteenth Amendment, and contrary to Lockett v. Ohio,

438 U.S. 586 (1978).

ARGUMENT

I. WHEN AN INDIGENT DEFENDANT'S SANITY AT THE TIME OF THE OFFENSE IS SERIOUSLY AT ISSUE, THE STATE MAY NOT CONSTITUTIONALLY DENY HIM THE MEANS TO ESTABLISH THE DEFENSE.

A. THE OKLAHOMA STATUTORY SCHEME PROVIDING DEFENSE COUNSEL FOR AN INDIGENT CRIMINAL DEFENDANT ALLOWS NO FUNDS FOR OBTAINING OR PRESENTING EXPERT WITNESSES IN SUPPORT OF THE INSANITY DEFENSE.

In Oklahoma, indigent criminal defendants are provided counsel for trial in one of three ways: (1) through the appointment of private counsel 1/, Title 22 Okl. Stat. §464, 1271; (2) appointment of the Office of the Public Defender in counties with a population exceeding 200,000, Title 19 Okl. Stat. §138.1 et.seq; or (3) through appointment in some counties of a part-time Public Defender.

1/ Such counsel may not refuse appointment. Refusal makes one subject to a contempt of court citation. Sontag v. State, 629 P.2d 1269 (Okl.Cr. 1981).

Title 19 Okl. Stat. §137.1; 138.4.

Although the State provides counsel to an indigent defendant, it provides NO funds for employment of experts for an insanity defense, or any other technical defense for that matter.

By statute, Oklahoma prosecuting attorneys are authorized to spend state funds for expert witnesses. Title 20 Okl. Stat. §1304(a)(b)(3). No reciprocal right to these funds is available under any circumstances for indigent defendants. This is true even where the court deems the evidence material and necessary, and orders these funds. 2/

2/ In State v. Paris Johnson, CRF-80-1081 and CRF-80-1082, the District Court, upon application of the defendant, ordered the Court Fund Board to pay $500 to hire a chemist the court deemed necessary and material to the defendant's care. The Court Fund Board refused, the defendant filed a writ of mandamus in the Oklahoma Supreme Court. That court refused to assume original jurisdiction and denied petitioner's writ of mandamus. Public

Amici believes a refusal to grant expert funds despite a finding by a court that the expert testimony is necessary and material to the defense clearly offends due process when the State is entitled to hire these additional experts. Cf. Wardeus v. Oregon, 412 U.S. 470 (1973).

Mr. Ake was represented by a private attorney appointed by the court, and assisted by Canadian County's part-time Public Defender. By terms of Title 22 Okl.Stat. §§464, 1271, all court appointed attorneys in Oklahoma, in non-capital cases, are limited to a maximum fee of $500 to $600. See Bias v. State, 568 P.2d 1269

2/ cont. Defender of Oklahoma County, T. Hurley Jordan, and Assistant Public Defender of Oklahoma County, Robert A. Ravitz v. Court Fund of Oklahoma County, the Honorable Jack R. Parr, Dan Gray, Court Clerk, and the Honorable Charlie Y. Wier. (Case No. 55715 denied September 20, 1980).

(Okl. 1977).3/ In capital cases, an attorney is entitled to a maximum fee of $2,500, the specific amount left to the discretion of the trial judge. Title 21 Okl.Stat. §701.13. The part-time Public Defender is limited to a salary of $7,200.00 per annum to be paid monthly. Title 19 Okl. Stat. §138.4(b).

Although counsel received token compensation for his own fee and out of pocket expenses, NO funds for establishment of this serious insanity defense were provided to counsel for Mr. Ake. The Court of Criminal Appeals has foreclosed that possibility in all cases involving indigent defendants. The court summarized its view in Maghe v. State, 620 P.2d 433, 435 (Okl.Cr. 1980):

3/ Counsel may petition for "extraordinary out of pocket expenses" and "extraordinary professional services" if certain requirements are met. Bias, supra, at 1272. Amicus OCDLA is unaware of any attorney receiving a greater fee than that provided by statute.

> "Admittedly, and as pointed out by the appellant, the assistance now sought at the state level is available to a federal indigent criminal defendant pursuant to sub section (e) of the Criminal Justice Act of 1964, as amended. 18 U.S.C.A. §3006 A(E)).
>
> However, as noted in Hardt v. State, Okl.Cr. 490 P.2d 752 (1971), state legislators could appropriately provide impecunious defendants with this aid if deemed practical and in the public interest. In the absence of enabling legislation, we know of no judicial precedent, constitutional mandate, or statutory authority in Oklahoma obligating this state, at its expense, to make available to the appellant, in addition to counsel, the full paraphenalia of defense.

Capital cases are not even excluded from this rule. Davis v. State, 665 P.2d 1186, 1190 (Okl.Cr. 1983); Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980).

Indigents represented by the Office of the Public Defender of Tulsa and Oklahoma

Counties fare no better. Although allowance is made by statute for office space and supplies, Title 19 O.S. §138.1, and salary for attorneys, Title 19 Okl. Stat. §138.4(a), 4/ secretaries, and investigators, Title 19 Okl. Stat. §138.6, the Oklahoma Court of Criminal Appeals has refused to provide funds to pursue the insanity defense or any defense requiring employment of an expert. See Davis, supra; Irvin, supra.

Thus, the denial in Mr. Ake's case was not an unusual one, but one which occurs with frequency in the state courts of Oklahoma.

4/ By terms of this statute, these salaries are equal to the salaries of the county's District Attorney and his assistants. Earl v. Tulsa County District Courts, 606 P.2d 545 (Okl.Cr. 1979).

B. OKLAHOMA RULES OF LAW AND PROCEDURE REGARDING THE INSANITY DEFENSE MAKE IT NEARLY IMPOSSIBLE TO PREVAIL WITHOUT THE AID OF EXPERT TESTIMONY.

Because of the manner in which Oklahoma law is administered, it is clear that an accused person cannot reasonably expect to prevail with an insanity defense -- no matter how strong-- without the aid of expert testimony. Without supporting expert testimony, this defense is practically doomed from the start.

Two reasons exist for this. First, Oklahoma uses a version of the M'Naghten Rule, 8 Eng. Rptr. 718 (HL 1843). The M'Naghten Rule (right/wrong test) is the most strict of all insanity tests. Oklahoma has consistently used M'Naghten since before statehood. In Maas v. Territory, 10 Okl. 714, 717, 63 P. 960, 961 (1901), the court said:

> "The test of responsibility is fixed at the point where one

> has the mental capacity to know that the act is wrong, and if one has sufficient mental capacity to distinquish between right and wrong, as applied to the particular act, and to understand the nature and consequences of such act, he is responsible for the same."

This rule was codified by the first legislature in Revised Laws 1910 §2094, now Title 21 Okl. Stat. §152(4). Adair v. State, 6 Okl.Cr. 284, 118 P.416 (1911). Recently, in Jones v. State, 648 P.2d 1251, 1254 (Okl.Cr. 1982), cert. den. ____U.S.___, 103 S.Ct. 799, the Court of Criminal Appeals reiterated:

> "The defendant must demonstrate at trial that during the commission of the crime he was suffering from mental disease or defect rendering him unable to differentiate between right and wrong, or unable to understand the nature and consequences of his acts."

This is the "exclusive" test for insanity in Oklahoma. See, Richardson v. State, 569 P.2d 1018, 1020 (Okl.Cr. 1977). Attempts to modify the rule have been rejected. See Tittle v. State, 44 Okl.Cr. 287, 280 P. 865 (1929) (irresistible impulse defense rejected); Gresham v. State, 489 P.2d 1355, 1357 (Okl.Cr. 1971) (diminished capacity defense implicitly rejected).

Second, Oklahoma procedures for establishing the insanity defense make it difficult to prevail to any degree without expert testimony. Although Oklahoma allows the opinion testimony of lay persons on this issue, 5/ Wilson v. State, 568 P.2d 1279 (Okl.Cr. 1977); High v. State, 401 P.2d 189 (Okl.Cr. 1965), this

5/ A predicate must be laid that the lay person had sufficient opportunity for observation of the accused. Supra.

evidentiary benefit is worthless as a practical matter. This is true because Oklahoma has long employed a presumption of sanity. Reed v. State, 23 Okl.Cr. 56, 212 P.441 (1923). In Munn v. State, 658 P.2d 482, 484 (Okl.Cr. 1983), the Court of Criminal Appeals explained:

> The initial burden is on the defendant to establish a reasonable doubt as to his sanity. Once the defendant establishes a reasonable doubt of his sanity, the presumption of sanity vanishes and it is incumbent upon the state to prove beyond a reasonable doubt that the defendant could distinquish between right and wrong and therefore was sane at the time of the offense." (Emphasis Added). See also Whisenhunt v. State, 279 P.2d 366 (Okl.Cr. 1955).

Without expert testimony, this presumption is difficult, if not impossible, to overcome. In Garrett v.

State, 586 P.2d 754 (Okl.Cr. 1978), the defendant, an eighty year old woman, was convicted of manslaughter in the first degree. She testified that she remembered walking to the victim's home, arguing with the victim, and that the victim struck her. Id. at 755. She did not remember shooting anyone. Id. Other witnesses testified that the defendant "looked like 'she had gone berserk'" Id. and "'looked wild.'" Id. at 754. The Court of Criminal Appeals noted that this evidence "is not evidence that brings the defendant within the above rule to show that she did not know right from wrong. As we stated in Whisenhunt, 'until legal insanity was established there was not sufficient evidence to create that reasonable doubt required by the law shift the burden of proving defendant's sanity to the state.'" Id. at 756. In Wilson v. State, 568 P.2d

1279 (Okl.Cr. 1977), the defendant was charged with pointing a weapon at another after an altercation with airport guards when the defendant attempted to drive his car up an exit ramp. A lay witness testified that the defendant "was not a normal person", and stated the basis for that opinion. Id. at 1280. The defendant also testified, but was largely unresponsive, and confused. Id. However, the Court of Criminal Appeals said no reasonable doubt was raised as to the defendant's sanity. Id. at 1281. It also noted that the state produced expert psychiatric testimony. Id. 6/

6/ It is noteworthy that the defendant in this case was represented by a public defender, who, as shown at supra, p. 6-11 had not the funds to employ or call an expert of his own.

Furthermore, reliance by the defendant on lay witnesses may prevent the jury from even considering the defense, as the court is not obligated to instruct on insanity unless a reasonable doubt as to sanity is raised. Bills v. State, 585 P.2d 1366 (Okl.Cr. 1978). Experience teaches that it is often harder for a lay witness to specifically testify whether one knew right from wrong at the time of his acts.

The problem of success in presenting an insanity defense without experts who can testify to the defendant's insanity at the time of the offense is illustrated by McFarthing v. State, 630 P.2d 324 (Okl.Cr. 1981). In McFarthing, the defendant was charged with robbery. He was represented by private counsel with no funds to hire an expert. At the time of the offense, he had been in and out of mental institutions, and two physicians testified his psychosis was

a recurring one, coming and going. Id. Other witnesses testified regarding his bizzare behavior. Id. at 324-325. Only the arresting officers testified that he seemed lucid to them. Id. McFarthing was convicted and sentenced to 15 years imprisonment. 7/

Thus, Oklahoma has chosen to apply the most strict of all insanity tests. At the same time it refuses to provide an indigent the financial means to meet this heavy burden. Such an incongruous policy should not be allowed to stand.

7/ The fundamental unfairness of this policy is best illustrated by the case of State v. Palmer, CRF-82-984, District Court of Oklahoma County, a case tried by Amicus Office of the Public Defender of Oklahoma County. Defendant was charged with Murder in the First Degree after he allegedly walked into a nursing home and stabbed an elderly lady to death . The defendant was a twenty year old indigent with no prior record. The defendant's family was able to obtain $400 for the hiring of an expert psychiatrist. Upon testifying at trial regarding the drug of PCP which might have been involuntarily taken by the defendant

C. THE CONSTITUTION REQUIRES THAT IF AN INDIGENT CRIMINAL DEFENDANT'S SANITY AT THE TIME OF THE OFFENSE IS SERIOUSLY IN DOUBT, HE MUST BE PROVIDED WITH THE NECESSARY MEANS TO OBTAIN AND PRESENT EXPERT TESTIMONY TO SUPPORT THAT DEFENSE.

Amici has shown above that in Oklahoma, Mr. Ake (and any indigent criminal defendant raising the insanity defense) faced nearly insurmountable odds in establishing a serious insanity defense without the aid of experts who could testify regarding his mental condition at the time of the offense. The barriers imposed by the State of Oklahoma are incompatible with our constitutional guarantees.

Amici agrees in full with the arguments

7/ cont. the night of the killing, and the effects of alcohol on an individual coupled with the doctor's opinion on the mental framework of the defendant, an Oklahoma jury convicted the defendant of the lesser included crime of manslaughter. Four hundred dollars to hire an expert prevented the breakdown in the adversarial process that our system counts on to produce just results. See Strickland v. Washington, __ U.S.___, slip op. p. 26 (1984).

advanced in Petitioner's Petition for Writ of Certiorari and Brief-in-Chief. With Petitioner, Amici argues that virtually every constitutional right available to an accused is violated when funds for expert witnesses are denied. Provisions related to equal protection, due process, effective assistance of counsel, and important Sixth Amendment rights to compulsory process for obtaining witnesses and confrontation of adverse witnesses require that indigent criminal defendants be provided with expert assistance where appropriate. Note, The Indigent's Right to an Adequate Defense: Expert In Investigational Assistance In Criminal Proceedings, 55 Cornell L.Rev. 632, 641-43 (1970).

Amici further notes that in denying funds of this nature on a constitutional basis, the Oklahoma Court of Criminal Appeals has relied on this Court's

pronouncement in United States ex rel Smith v. Baldi, 344 U.S. 561 (1953). Ake v. State, 663 P.2d 1, 6 (Okl.Cr. 1983); See also Irvin v. State, 617 P.2d 588, 594 (Okl.Cr. 1980). However, United States ex rel Smith v. Baldi is distinquishable. This Court held in Smith v. Baldi that where a Pennsylvania court had already appointed one psychiatrist to examine the accused as to his insanity at the time of the offense and where that psychiatrist gave testimony, there was no constitutional mandate for Pennsylvania to appoint a second psychiatrist after petitioner plead guilty, to provide information as to appropriate sentence. Id. at 568. In Oklahoma, the state is required to submit a defendant for pre-trial testing to determine his present competency only, 8/

8/ This is not meant to imply that commitment is automatic. The procedure involves the filing of a formal

not his legal sanity at the time of the offense. Title 22 Okl.Stat. §1175.1 et. seq. 9/ This clearly distinguishes Oklahoma's procedures from those in Baldi as Oklahoma defendants are given no opportunity whatsoever for psychiatric examination regarding mental state at the time of the offense. See n. 10, infra.

Denied state funded assistance, Mr. Ake was placed in the position of all Oklahoma indigents who raise the insanity defense. Although on trial for his life, he still could not surmount the obstacle of his indigency and offer expert evidence in support of his defense. This situation, all too common in Oklahoma, "in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity." Report of the Attorney General's Commission on Poverty in the Administration of Federal Criminal Justice, at 11 (1963).

II. AN INDIGENT DEFENDANT FACING THE DEATH PENALTY IS ENTITLED TO NECESSARY FINANCIAL ASSISTANCE TO PREPARE AND PRESENT RELEVANT MITIGATING EVIDENCE.

Petitioner's brief-in-chief insists that an indigent criminal defendant should be allowed means to present evidence in mitigation of punishment and in rebuttal of the state's evidence of aggravating circumstances. (Brief of Petitioner, p. _____). Amici wholeheartedly agree.

8/ cont. application, and the evidentiary hearing before one can be committed for observation. Title 22 Okl.Stat. §1125.3. Another hearing is required before one may be declared presently incompetent. Title 22 Okl.Stat. §1175.4, 1175.5.

9/ On at least one occasion, a judge ordered the state mental hospital to do psychological testing on a capital defendant. Legal counsel for the hospital told the parties that no statutory authority would allow them to comply with such an order. Davis v. State, supra. Motion Transcript Feb. 21, 1978 p. 10 (Appendix A). The hospital would not perform the tests.

Amici point out to this court in addition that a capital defendant in Oklahoma is provided NO financial means to explore such mitigating evidence, much less to rebut the state's evidence in aggravation.

This court in Eddings v. Oklahoma, 455 U.S. 104 (1982) has most recently recognized that evidence of a defendant's character can be relevant mitigating evidence and must be presented to the trier of fact if it is available. See also, Lockett v. Ohio, 403 U.S. 586 (1978). Oklahoma's capital punishment statute directs the Court of Criminal Appeals in all cases to consider "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Title 21 O.S. §701.13(C)(3). The Oklahoma Court of Criminal Appeals in Cox v. State, 644 P.2d 1077, 1079 (Okl.Cr. 1982), noted:

> "A mitigating circumstance for the jury to consider is whether 'the murder was committed while the defendant was under the influence of mental or emotional disturbance.' Additionally, the trial judge is required, independent of the jury's determination, to consider whether the defendant's physical or mental condition calls for special consideration.
>
> Even if the defendant is determined to be legally sane, he should be afforded the opportunity to introduce evidence of his mental condition at the punishment stage. Psychiatric testimony of the defendant's mental or emotional state at the time of the killing may very likely influence the jury's decision as to whether to recommend a life sentence or a sentence of death." 10/

10/ Cox had been convicted of two counts of murder in the first degree and sentenced to death. On appeal, the Court of Criminal Appeals reversed the conviction for failure

Incredibly, the Court of Criminal Appeals, despite this statement, affirmed the denial of funds to Cox for establishing

10/ cont. to commit the defendant for observation to determine present competency. On retrial, Amicus Office of the Public Defender of Oklahoma County represented Cox. Cox was convicted of murder in the first degree and received a life sentence on one count and sentenced to twenty-five years on a conviction of manslaughter on the other count.

The Cox decision clearly demonstrates the dilemma an Oklahoma criminal defense lawyer faces. By statute and the Cox decision, defense counsel must reasonably believe his client is presently incompetent to stand trial before he can ethically recommend commitment. Cox v. State, supra at 1078-79. Absent this reasonable belief, the attorney can not ethically seek commitment, no matter how strong the evidence of mental or emotional deficiency, or retardation short of present incompetency. A lawyer cannot compel commitment and establish mitigating evidence which could amount to a sentence of less than death. The jury is never presented relevant mitigation evidence which could effect its decision and thus insure reliability in sentencing.

this mitigating evidence. Id. at 1077. 11/ Irvin v. State, supra; Davis v. State, supra.

"Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if funds available for compelling the evidence are unavailable." Westbrook v. Zant, 704 F.2d 1481, 1496 (11th Cir. 1983). In Oklahoma, indigent defendants are precluded financially from developing psychiatric evidence for use in mitigation of punishment at the second stage of trial. It is undisputed that evidence of mental disturbance less than insanity is a valid mitigating circumstance. Eddings v. Oklahoma, supra. See also Estelle v. Smith, 451 U.S. 454

11/ A capital defendant is not even entitled to a pre-sentence investigation report, a right available to most non-capital defendants. See, Title 22 Okl.Stat. §982. Smith v. State, 594 P.2d 784 (Okl.Cr. 1979).

(1981). United States ex rel Smith v. Baldi, supra at 573 (Frankfurter, J., dissenting). Funds should be provided upon a reasonable showing of need to procure valid mitigating evidence.

In this regard, the court is directed to its decision in Bounds v. Smith, 430 U.S. 817 (1977). In Bounds, this Court held, "the cost of protecting a constitutional right cannot justify its total denial." Id. at 825. In Bounds, the issue was whether state prison inmates are entitled to assistance by the State in pursuing legal remedies. The court held that requiring the expenditure of state funds is necessary to provide a person's Fourteenth Amendment right of access to the courts. Surely if a person is entitled to expenditure of funds to guarantee his right to the courts, a capital defendant is entitled to funds to prove his execution

would constitute a cruel and unusual punishment due to the peculiarities of his character and upbringing. Thus, Bounds, when read in conjunction with Lockett, requires the allowance of funds to the defendant to investigate mitigation evidence.

Even without Bounds, Lockett v. Ohio by its own terms requires this result. 12/

Oklahoma provides no authorization of

12/ "There is no perfect procedure for deciding in which cases governmental authorities should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to the aspects of the defendant's character and record into circumstances of the offense proffered in mitigation, creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Id. at 605.

funds to allow an indigent defendant to pursue and present relevant mitigating evidence. This result is totally incompatible with the spirit, if not the dictate, of Lockett. Several Oklahoma trial judges, experienced with capital sentencing evidence and procedures, believe this to be so. See Appendix A, Davis v. State, Motion Hearing Transcript February 21, 1978; Appendix B, Johnson v. State, Motion Hearing Transcript, January 28, 1982.

CONCLUSION

Denial of funds for expert psychiatric testing denied appointed counsel the ability to present a serious insanity defense, or to rebut the state's allegation of aggravating circumstances. (Brief for petitioner at p. _____). This situation is common for most indigent accused persons in Oklahoma who raise a necessary and substantial insanity defense requiring

expert testimony. This deprivation is constitutionally infirm on multiple constitutional grounds, and the judgment and sentence of the Oklahoma court must be vacated and remanded with directions to afford petitioner these rights.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE V. DAVIS, CRF-77-2905, 2906

Motion Hearing, dated Feb. 21, 1978, before the Honorable David Cook, District Judge:

THE COURT: Is there anything you can stipulate in regard to what was said or done at that hearing?

MR. STUART: Your Honor, I believe we can stipulate that Judge Hunter's order was to the effect that that be done and him sent to Central State for psychological testing or educational evaluation if it could be done on Monday and him sent down there and back prior to Tuesday. That is as far as I will stipulate.

MRS. JOPLIN: Excuse me. After we left Judge Hunter's courtroom, Mr. Stuart and I called Central State and talked to Mike Cain who is legal counsel for Central State, who told both of us that there was no statutory authority that would allow them to comply

with such an order. They said they couldn't do it.

MR. STUART: I will so stipulate that Mr. Cain did say that...

9Tr. p. 10, L. 9 - 24.

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THE COURT: Judge, again, we appreciate your courtesy in coming in and supplying the record which wasn't made before you last Friday afternoon. I would like to be advised of what did occur...

[DISTRICT] JUDGE [STEWART M. HUNTER]: As I recall it was a motion for funds to hire an expert witness to testify in mitigation. The gist of it being that he wanted to get a psychiatrist or psychologist to examine the defendant and then testify in mitigation presuming the trial reached that point.

My feeling was that if defendant had sufficient funds of his own and was incarcerated. I would order him to be made available for an examination by his own private psychiatrist. I felt that an indigent should be entitled to the same thing if it is available. And my intent was to order him to be made available for an examination by a State psychiatrist because there are no state funds available to my knowledge for expert witnesses in either event. My thinking was that it's not one of those things that is necessarily necessary, but it would sure be nice to have if you were a defendant in a first degree murder case.

THE COURT: Thank you, Judge.

(Tr. p. 23, L. 22 through p. 24, L. 18).

APPENDIX B

STATE V. JOHNSON, CRF-81-4939

Motion Hearing, dated Jan. 28, 1982, before the Honorable Joe Cannon District Judge:

(Regarding Motion for Independent Psychological Evaluation)

THE COURT: You can't hire--you can't hire investigators and you can't hire experts and all that and you talked me into--one day of ruling that again. And I think you're right on the law. And I knew--I know you're right.

But the trouble of it is, there's three fellows out there on the State Capitol that say that that's not the law. And you took it out there and they overruled you--and they overruled me, not you. And I think they're flirting with dynamite...

...Be overruled. (Tr. p. 16, L. 9-20).

MR. RAVITZ: For the record, Judge, I would like to state that I don't have any funds. My client's indigent...

THE COURT: Well, for whatever its worth, Ravitz...I agreed with you a year ago, I agree with you now...

And you're not--I cannot legally give you those funds. And what the Supreme Court of the United States is going to say about it one of these days is another ball game. But I can't do that. And the Court of Criminal Appeals told me that you can't do this. I've got to follow them. (Tr. p. 18, L. 1-14).

* * *

THE COURT: You've got to convince them [the Court of Criminal Appeals] out there. That's who you've got to convince.

MR. RAVITZ: I've tried.

THE COURT: Take it on up to the Supreme Court of the United States. (Tr. p. 20, L. 1-5).